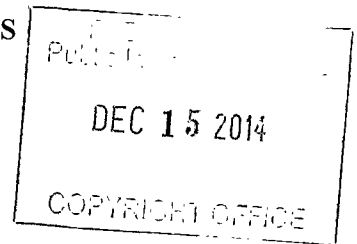


BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
WASHINGTON, D.C.



In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR
(2016-2020)

Received

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Copyright Royalty Board

**SOUNDEXCHANGE'S OPPOSITION TO THE NATIONAL ASSOCIATION
OF BROADCASTERS' MOTION TO COMPEL SOUNDEXCHANGE
TO PROVIDE DISCOVERY REGARDING THE RECORD LABELS'
PROMOTIONAL ACTIVITIES DIRECTED TO RADIO BROADCASTERS**

Pursuant to 17 U.S.C. § 803(b)(6)(C)(v) and 37 C.F.R. § 351.5(b), SoundExchange, Inc. ("SoundExchange") respectfully submits this Opposition to the National Association of Broadcasters' ("NAB") Motion to Compel SoundExchange to Provide Discovery Regarding the Record Labels' Promotional Activities Directed to Radio Broadcasters ("Motion").

As the Judges know, NAB did not join iHeartMedia, Inc.'s ("iHeart") motion, filed last month, to obtain studies, analyses, and the like related to the promotional effect, if any, of webcasting. NAB nevertheless filed its own reply in support of iHeart's motion, advancing new arguments, purportedly in support of the same relief sought by iHeart, but actually seeking to compel production in response to a number of requests (and a broader set of documents) that iHeart did not try to justify. Now that it has filed its own Motion, NAB purports to say that the relief iHeart seeks "fully encompasses the relief that NAB seeks," and that NAB's Motion would be mooted by the grant of iHeart's motion. Motion at 1-2 & n.1. This statement, however, is belied by its own request for relief that demands documents not mentioned or encompassed

within the document requests at issue. In an attempt to justify its broader (and even *more* burdensome) demand, NAB devotes much of its briefing to new arguments that iHeart did not make. The centerpiece of NAB's argument is the following syllogism: (1) record companies engage in promotional efforts for terrestrial radio promotion; (2) internet "simulcasts" are transmissions of the same music being played on the corresponding terrestrial radio station; ergo, (3) any studies, analyses, etc. relating to the promotional value of terrestrial radio necessarily are analyses of the promotional value of webcasting.

NAB's argument fails because analyses of promotion through terrestrial broadcasts *as terrestrial* broadcasts are *not* analyses of internet simulcasts *unless the analyses specifically focus on internet simulcasts*. This proceeding is not setting rates for terrestrial broadcasts. The promotional issue here instead concerns "[t]he promotional or substitution effects of the *use of webcasting services* [including simulcast services] by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings." *Webcasting III Remand*, Dkt No. 2009-1 CRB, 79 Fed. Reg. 23102-01, 23110 n.25 (emphasis added). SoundExchange demonstrated in its opposition to iHeart's motion to compel that documents concerning webcasting—including internet simulcasts as internet simulcasts—would exist, if at all, at the record companies' corporate levels. And SoundExchange agreed to produce, and has produced, those responsive, non-privileged documents on that subject located after a reasonable search. That disposes of NAB's argument, and this Motion should be denied.

BACKGROUND

I. NAB Purports to Seek the Same Documents at Issue in iHeart's Motion, but NAB's Motion Actually Discusses a Much Broader Set of Documents.

NAB claims that it is asking for merely a “subset” of the documents that iHeart requested in its motion. Motion at 6. iHeart sought “documents regarding the promotional effect of webcasting (including simulcasting) services” from ten individuals who work for various record labels within Universal Music Group (“UMG”), Sony Music Entertainment (“Sony”) and Warner Music Group (“Warner”). iHeart Reply at 8. NAB’s Motion, however, sweeps much more broadly.¹ Indeed, NAB seeks categories of documents broader than and not described by the actual text of the requests for production of documents. NAB’s broader requests include documents that “discuss record label strategy in promoting recordings to radio broadcasters” and documents that “report to label or company management about the justification for . . . such promotion.” Motion at 15. These categories of documents are simply not mentioned in the document requests at issue (14, 15, 16, 28, and 56). *See* Motion Ex. B.

II. SoundExchange Previously Explained that Studies, Analyses, and the Like Regarding Webcasting's Promotional/Substitutional Effect Would Not Be Found at the Individual Labels.

As SoundExchange explained at length in its opposition to iHeart’s motion, the sorts of studies and analyses that evaluate the promotional and/or substitutional effects of webcasting—

¹ For example, NAB requests all documents that “*discuss* record label *strategy* in promoting recordings” and documents that “*report* to label or company management about the *justification* [or *reasons*] for . . . such promotion.” Motion at 3 (emphases added). In contrast, iHeart’s motion sought those documents relating to “the promotional effect of webcasting services.” iHeart Motion at 1. To the extent that the penultimate sentence of iHeart’s motion sought a broader category of documents relating to the “promotional value of airplay on terrestrial radio, efforts to obtain such airplay, and that compare or contrast terrestrial radio and non-interactive services,” such relief was briefed or argued by iHeart. iHeart Motion at 15. Even if it was, it is still more limited in scope than what NAB seeks here.

including simulcasting of terrestrial broadcasts—would not be found at the label-level and, therefore, would not be found with these ten custodians. *See* SoundExchange’s Opposition to iHeartMedia’s Motion to Compel SoundExchange to Produce Documents in Response to Discovery Requests (“SoundExchange Opposition to iHeart’s Motion”). Label promotion departments have promoted artists and new releases to terrestrial radio stations and do not ordinarily create or commission “studies, analyses, surveys, presentations, or memoranda,” referring or relating to the existence or nonexistence of a substitutional or promotional effect of webcasting services. Declaration of Rand Levin filed on November 21, 2014 (“Rand Decl.”) ¶¶ 3-4; Declaration of Paul Robinson filed on November 21, 2014 (“First Robinson Decl.”) ¶¶ 9-10; Declaration of Julie Swidler filed on November 21, 2014 (“Swidler Decl.”) ¶¶ 3-4. The major recorded music companies conduct or commission such studies and analyses at the corporate level. Levin Decl. ¶ 5; First Robinson Decl. ¶ 11; Swidler Decl. ¶ 5.

SoundExchange has already produced numerous responsive studies and analyses regarding the promotional and/or substitutional effect of webcasting.² *See e.g.*, Bates Nos. SNDEX0079240-SNDEX0079925; SNDEX0080021-SNDEX0080069; SNDEX0096712-SNDEX0096820; SNDEX0099032-SNDEX0099124; SNDEX0100373-SNDEX0100405; SNDEX0110036-SNDEX0110046; SNDEX0112116-SNDEX0112137. These are the studies and analyses responsive to the requests NAB seeks to compel here. To the extent recorded

² SoundExchange has also produced numerous joint marketing and promotion plans for the top ten grossing projects from the major record labels, detailing efforts that individuals working for marketing and promotion departments at the various record labels have exerted to gain attention and airplay for their artists across multiple channels and platforms. These plans detail the efforts described by Mr. Dennis Kooker and Mr. Jeffrey S. Harleston in their testimony. *See, e.g.*, Bates Nos. SNDEX0097864-SNDEX0098006; SNDEX0106839-SNDEX0106865; SNDEX0110047-SNDEX0110222; SNDEX0118780-SNDEX0118844; SNDEX0118853-SNDEX0118880; SNDEX0118884-SNDEX0118988; SNDEX0119221-SNDEX0119260; SNDEX0123286-SNDEX0123356.

music companies have specifically evaluated the promotional or substitutional impact of simulcasting, these are included in the studies already produced. Declaration of Jeff Walker filed concurrently herewith (“Walker Decl.”) at ¶ 12; Declaration of Paul Robinson filed concurrently herewith (“Second Robinson Decl.”) ¶ 11. To the extent NAB’s requested relief extends beyond such studies and analyses related to the promotional or substitutional effect of webcasting services, it is overbroad, nonspecific and not “directly related” to SoundExchange’s written direct testimony.

LEGAL STANDARD

Discovery in these proceedings is limited. “A participant in a royalty rate proceeding may request of an opposing participant nonprivileged documents that are directly related to the written direct statement . . . of that participant. Broad, nonspecific discovery requests are not acceptable.” 37 C.F.R. § 351.5(b)(1). The extent to which a party should undertake the burden of collecting and producing documents must be viewed in light of the extent to which such documents are “directly related” to that participant’s written direct statement and the issues central to this proceeding. The question of undue burden in federal civil proceedings likewise takes this relationship into account:

[T]o consider a number of factors potentially relevant to the question of undue burden, including . . . whether “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”

Watts v. S.E.C., 482 F.3d 501, 509 (D.C. Cir. 2007) (quoting Fed. R. Civ. P. 26(b)(1)-(2)).

Motions to compel are viewed in light of the balance between the “burden or expense” imposed and the “likely benefit”—including “the importance of the proposed discovery in resolving the issues” at stake in this case. *Id.*

ARGUMENT

I. NAB's Motion Seeks to Compel the Production of Documents that Are Not "Directly Related" to SoundExchange's Written Direct Testimony.

A. To the extent NAB seeks documents about terrestrial radio promotion as terrestrial radio promotion—such documents not directly related; those documents that are directly related have been produced.

NAB points to two witnesses (one from Sony and one from UMG) who discuss their recorded music companies' efforts and investments in the production of sound recordings as evidence that a huge category of documents related *exclusively* to terrestrial radio are discoverable here. These two witnesses discuss their companies' investment in the production of sound recordings—a point that can be sufficiently tested through the substantial number of financial documents already produced. Neither testifies to the promotional benefits of terrestrial radio—nor would they because the promotional (or substitutional) impact of terrestrial radio is not at issue in this case. Notably, NAB cites no testimony and makes no argument that such documents are directly related to testimony submitted by Warner's witness, Mr. Ron Wilcox.

Dennis Kooker, President of Global Digital Business and U.S. Sales for Sony Music Entertainment, testified regarding the amounts spent to market and promote artists (which have been produced) and overall marketing plans (which have been produced). Mr. Kooker testifies:

- Sony invests substantial sums in marketing and promoting its artists: "In the most recent fiscal year alone, we invested over [\$ omitted number³] to sell and market our recordings, including our out-of-pocket marketing expenses and our selling and marketing overhead."
- Sony's efforts include, as examples: "promotion, publicity, social media, live tour support, video promotion, and brand sponsorship, as well as traditional media like print and TV advertising."

³ As NAB did, SoundExchange has omitted the amounts of money spent so this filing can be filed as public document in its entirety.

Written Direct Testimony of Dennis Kooker ("Kooker WDT") at 4-5. Nowhere does Mr. Kooker discuss efforts directed at terrestrial radio in particular, nor does he discuss the promotional benefits (if any) that record labels obtain from having their music played on terrestrial radio.

Jeffrey S. Harleston, General Counsel and Executive Vice President for Business and Legal Affairs for North America for Universal Music Group, also testified (under the heading "Marketing") regarding the industry expertise a record label brings to an artists' career. He testifies:

- UMG develops unique marketing plans and efforts: "The process of marketing and promoting an artist is a creative endeavor that calls upon a record label's music industry expertise. . . . Through the unique marketing plan designed for each artist, we create opportunities for the artist to communicate their message."
- UMG aims to achieve exposure and discovery for artists: "Our goal is to create awareness among consumers about the artist's music, and to increase interest and excitement surrounding the artist to incentivize consumers to purchase the music. We use our expertise to help each artist build a buzz that is engineered to "break" that artist to specific demographics."
- UMG achieves exposure and discovery through promotion, music videos, artist development, in-house publicity, sales, new media outreach, playlist development for digital services, and more.
- UMG's expenditures to market and promote artists are substantial: "In fiscal year 2013, we spent [\$ omitted number] on gross marketing costs net of recoveries to third parties, as well as [\$ omitted number] on our marketing overhead for the various departments focused on this important work."

Written Direct Testimony of Jeffrey S. Harleston ("Harleston WDT") at ¶¶ 22-30. Mr. Harleston does not testify regarding efforts directed at terrestrial radio in particular, nor does he opine on the effect (or lack thereof) of terrestrial radio airplay on other sources of revenue.

SoundExchange has agreed to produce and has produced numerous documents substantiating the costs discussed by Mr. Kooker and Mr. Harleston. *See, e.g.* Bates Nos. SNDEX0106867-SNDEX0106868; SNDEX0118300-SNDEX0118302. Likewise,

SoundExchange has produced overall marketing and promotion plans covering the various efforts undertaken by UMG that Mr. Harleston discusses. *See, e.g.*, Bates Nos. SNDEX0097864-SNDEX0098006; SNDEX0106839-SNDEX0106865; SNDEX0110047-SNDEX0110222; SNDEX0118780-SNDEX0118844; SNDEX0118853-SNDEX0118880; SNDEX0118884-SNDEX0118988; SNDEX0119221-SNDEX0119260; SNDEX0123286-SNDEX0123356. SoundExchange has therefore produced the documents directly related to testimony on this point. Furthermore, it is not clear from NAB's Motion that the facts that Sony and UMG have spent significant amounts and engaged in activities to market and promote their artists are even in contention.

Notably, NAB does not cite any portion of testimony from SoundExchange's witness from Warner Music Group, Ron Wilcox. NAB nevertheless demands that SoundExchange produce discovery from Warner as well. If anything, it cannot be said that the documents NAB seeks are "directly related" to Mr. Wilcox's testimony and NAB does not so argue.

B. NAB Confuses the Two Meanings of "Promotion."

NAB confuses the general recorded music industry practice of promotion—what record labels do to bring attention to new artists or releases—with the statutory factor involving promotion—"[t]he promotional or substitution effects of the *use of webcasting services* [including simulcast services] by the public on the sales of phonorecords or other effects of the use of webcasting that may interfere with or enhance the sound recording copyright owner's other streams of revenue from its sound recordings." *Webcasting III Remand* at 23110 n.25 (emphasis added).

Whether *recorded music companies* promote the sales of their own content is not at issue in this proceeding. Whether terrestrial radio broadcasts—as terrestrial radio broadcasts—promote sales is not at issue either. The Judges are not setting rates for terrestrial radio

broadcasting. To the extent NAB is seeking documents related to simulcasts as webcasts—*i.e.*, when music is played and listened to by internet users, not terrestrial radio users—such documents do relate to the statutory inquiry. But record labels’ promotion departments’ efforts to gain attention for new releases and artists through *terrestrial radio* or the promotional impact of *terrestrial radio* airplay (if any) are not evidence of anyone’s assessment regarding the promotional impact of *simulcast* airplay. Those are distinct inquiries.⁴ Efforts targeting promotion to *terrestrial radio* is evidence of a belief that *terrestrial radio* exposure may help that artist or release gain attention. The fact that this incidentally causes play on simulcast services does not mean that these efforts are directed at simulcast—they are not. Nor does it mean that individuals working in promotion departments are focused on gaining attention for their artists through simulcasts.

In any event, to the extent Sony, UMG, and Warner have studies, analyses and the like regarding the promotional effect of simulcasting, these would be located at the corporate level. Walker Decl. at ¶ 12; Second Robinson Decl. ¶ 11. SoundExchange has already produced numerous such studies and has thus fulfilled its discovery obligation with respect to these requests.

⁴ NAB mischaracterizes Mr. Harrison’s testimony from SDARS II as stating that “people who work in the promotions department’ welcome all forms of promotion on all platforms.” Motion at 13. This takes Mr. Harrison’s testimony out of context. In context, Mr. Harrison was explaining that individuals who work in promotion departments do not necessarily analyze the promotional or substitution impact of their work. This is further evidence that the documents NAB seeks are not at the label level. Mr. Harrison states, in full: “While it is important for negotiators to consider the relative promotional and substitutional characteristics of various music services, it is my understanding that people who work in the promotions department take this issue much less seriously, if they consider it at all. Their function is to promote records, and in carrying out their duties, they are agnostic about the platform on which the records are gaining attention or spins.” Motion Ex. A. As Mr. Harrison explains and SoundExchange’s evidence will make clear, “gaining attention or spins” for a particular record or artist does not mean that a music service promotes other sources of revenue to the recorded music industry on the whole.

II. NAB's Motion to Compel Is Overly Broad and Nonspecific and Poses an Undue Burden on SoundExchange and its Witnesses' Companies.

A. NAB describes its requests as more limited than iHeart's, but it has effectively expanded those requests.

NAB purports to limit its Motion to a subset of the document requests sought by iHeart.

In fact, it expands the documents requested to include "strategy" documents and documents reflecting the "reasons" or "justification" for such promotion, which were simply not sought and nowhere mentioned as a part of requests 14, 15, 16, 28, and 56.⁵ Motion at 6. NAB's request for relief is not constrained by the requests it actually served. It seeks documents that:

- (i) discuss record label strategy in promoting recordings to radio broadcasters;
- (ii) report to label or company management about the justification for or effect of such promotion; or
- (iii) analyze the effects of such promotion.

Motion at 15. These are essentially new requests for production of documents. NAB makes no attempt to justify why it should be entitled to a broader set of documents than those sought by the requests for production of documents that were served as a part of discovery. The *only* one of these requests that resembles the relief sought by iHeart and the documents actually requested is (iii), documents that "analyze the effects of such promotion." To the extent these documents relate to the promotional or substitutional effects of webcasting (including simulcasting) services, they have already been produced.

Furthermore, NAB does not even limit documents along the lines of Sirius XM's "alternative relief" in its improper reply to iHeart's Motion: "In the alternative, Sirius XM respectfully requests that the Judges compel SoundExchange to produce all such studies, analyses, surveys, presentations, or memoranda discussing any promotional effect of webcasting

⁵ The full text of these requests is included in Exhibit B to NAB's Motion.

services.” Sirius XM Radio Inc.’s Reply in Further Support of iHeartMedia, Inc.’s Motion to Compel SoundExchange, Inc. to Produce Documents in Response to Discovery Requests at 4. NAB appears to continue to seek *all documents* and now seeks all documents related to a different category of documents than those actually requested.

B. SoundExchange has already fully or substantially complied with requests 14, 15, 16, and 28.

As explained in SoundExchange’s Opposition to iHeart’s Motion, and further supplemented here, SoundExchange has already produced numerous documents responsive to the requests actually asked:

- In response to Request No. 14, which seeks studies, analyses, surveys, presentations, etc. on the “substitutional or promotional effect” of music streaming services and/or terrestrial radio, SoundExchange produced dozens of internal and commissioned studies addressing substitution and promotion. *See, e.g.*, Bates Nos. SNDEX0079240-SNDEX0079925; SNDEX0080021-SNDEX0080069; SNDEX0096712-SNDEX0096820; SNDEX0099032-SNDEX0099124; SNDEX0100373-SNDEX0100405; SNDEX0110036-SNDEX0110046; SNDEX0112116-SNDEX0112137.
- In response to Request No. 15, which seeks studies, analyses, surveys, presentations, etc. on the substitutional or “promotional effect” of music streaming services and/or terrestrial radio, SoundExchange produced dozens of internal and commissioned studies addressing substitution and promotion. *See, e.g.*, Bates Nos. SNDEX0079240-SNDEX0079925; SNDEX0080021-SNDEX0080069; SNDEX0096712-SNDEX0096820; SNDEX0099032-SNDEX0099124; SNDEX0100373-SNDEX0100405; SNDEX0110036-SNDEX0110046; SNDEX0112116-SNDEX0112137. Request No. 15 also seeks “documents sufficient to show the amounts spent by each witness’s company (or its subsidiary labels) to promote artists” on streaming services and terrestrial radio. SoundExchange has produced such documents. *See, e.g.*, Bates Nos. SNDEX0119347-SNDEX0119358; SNDEX0123246-SNDEX0123285; SNDEX0119307-SNDEX0119344.
- In response to Request No. 16, which seeks “[a]ll marketing plans or promotion plans for the top ten grossing artists represented by or affiliated with each witness’s company,” SoundExchange produced hundreds of pages of marketing and promotional plans that detail record labels’ efforts to gain airplay for their artists. These plans detail efforts targeted at terrestrial radio in addition to other sources. *See, e.g.*, Bates Nos. SNDEX0097864-SNDEX0098006; SNDEX0106839-SNDEX0106865; SNDEX0110047-SNDEX0110222;

SNDEX0118780-SNDEX0118844; SNDEX0118853-SNDEX0118880;
SNDEX0118884-SNDEX0118988; SNDEX0119221-SNDEX0119260;
SNDEX0123286-SNDEX0123356.

- In response to Request No. 28, which seeks, from Sony, studies, analyses, surveys, presentations, etc. on the “substitutional or promotional effect” of music streaming services and/or terrestrial radio, SoundExchange produced dozens of internal and commissioned studies addressing substitution and promotion. *See, e.g.*, Bates Nos. SNDEX0079240-SNDEX0079925; SNDEX0080021-SNDEX0080069; SNDEX0096712-SNDEX0096820; SNDEX0099032-SNDEX0099124; SNDEX0100373-SNDEX0100405; SNDEX0110036-SNDEX0110046; SNDEX0112116-SNDEX0112137.

C. Request 56 should be struck as not directly related, overly broad, unduly burdensome and duplicative.

SoundExchange has stood on its objections to Request No. 56, which is not directly related, unduly overbroad, burdensome, and cumulative. The Request (seeking documents from UMG) itself is a mouthful:

Request No. 56: Each document related to Mr. Harleston’s assertion in paragraph 23 of his testimony that UMG’s “promotion departments use their expertise to develop pathways of discovery and exposure for our artists across all media platforms,” including, but not limited to, for each year from 2009 to the present, (a) documents sufficient to identify each such media platform and the separate amounts spent on obtaining exposure on each such platform, including terrestrial radio; (b) documents related to each type of activity in which UMG or any of its subsidiary labels engages to obtain such exposure on each such platform; and (c) each study, analysis, survey, presentation, memorandum, or other document related to any effort to determine or evaluate the impact of airplay on any of these media platforms, including terrestrial radio, on sales of sound recordings. *See* Harleston Test. ¶¶ 22-30. Please include in your response (i) documents sufficient to show the total number of promotional albums directly or indirectly (through a third party promoter, distributor, or other third party) given to any radio station, radio station simulcaster, or Digital Service; (ii) documents related to artist visits to any radio station, radio station simulcaster, or Digital Service and documents sufficient to quantify the total number of such visits; (iii) each agreement with any third party (including any independent promoter) concerning the promotion of UMG’s recordings to any radio station, radio simulcaster, or Digital Service, all documents related to the negotiation of those agreements, and documents sufficient to show the amount of money or any other consideration paid to such third parties under each agreement; (iv) each agreement with any radio station, radio station simulcaster, or Digital Service (including the “deals with interactive services” mentioned in paragraph 27 of Mr. Harleston’s testimony and any similar or related agreements), all documents

related to the negotiation of those agreements, and documents sufficient to show the amount of money or any other thing of value given to any radio station, radio station simulcaster, or Digital Service, or their listeners or customers pursuant to those agreements; (v) all documents reflecting communications related to efforts to obtain airplay for one or more recordings released by UMG for play on any radio station, radio station simulcaster, or Digital Service, including, but not limited to, letters, emails, internal memos, and notes; and (vi) each document concerning any advertisements directed in whole or in part to any radio station, radio station simulcaster, or Digital Service (or programmers thereof), including tip sheets.

A nearly identical request was denied in *Webcasting II*.⁶ The Judges explained that the request then, as true now:

“is overly broad, unduly burdensome, duplicative of information sought in other requests . . . and may, in part, be obtainable more conveniently through the webcasting services themselves to the extent that there are efforts by these record companies to promote individual sound recordings through webcasting services.”⁷

This request should be struck in its entirety. Not only are many of the subparts not directly related to Mr. Harrison’s testimony—for example, “all documents related to the *negotiation* of [agreements with any independent promoter]”—they are overbroad, nonspecific to issues in this case, and unduly burdensome. To permit such a request to stand may result in the Services framing all their requests as multi-party requests spanning multiple pages of testimony in the rebuttal phase. NAB does not even attempt to defend the propriety of such an overbroad request and NAB’s newly conceived framing of the requests as documents related to “strategy” and the “reasons” that record labels have engaged in promotion through terrestrial radio does nothing to limit this overbroad and unduly burdensome request.

⁶ An excerpt of the document requests at issue in *Webcasting II* is attached as Ex. A (Request No. 215) to the Declaration of Rose Leda Ehler. The Judges denied a motion to compel documents responsive to request 215, which is substantially similar to request 56 here.

⁷ Order Granting in Part and Denying in Part the Motion of Digital Media Association and its Member Companies, NPR, Corporation for Public Broadcasting Qualified Public Radio Stations and the Radio Broadcasters to Compel SoundExchange to Produce Discovery Relating to the Promotional Value of Airplay at 3, Docket No. 2005-1 CRB DTRA (Mar. 28, 2006) (Web II).

D. Even if NAB is not expanding the requests and even if limited to ten individuals, these requests continue to pose an undue burden not outweighed by their tangential relevance, if any, to the issues in this case.

Even if it is not expanding the request for relief, NAB continues to request “all documents” relating to studies, analyses, surveys, presentations, etc. on the “substitutional or promotional effect” of music streaming services and/or terrestrial radio. Motion at 6 (citing Services’ Req. Nos. 14, 15, 28, 56). As explained in SoundExchange’s Opposition to iHeart’s motion, this demand is amenable to two readings. Either (1) such documents do not exist in the places that NAB is asking be searched or (2) the request encompasses a category so large, “broad,” and “nonspecific” that it would require production of *every* document from ten individual record label custodians.⁸ See SoundExchange’s Opposition to iHeart’s Motion at 20-21.

NAB argues that seeking such documents from ten individuals is not burdensome, however, NAB neglects that the facts established by SoundExchange’s supporting declaration apply to the ten identified individuals who work in or have worked in promotion:

- 1) “[P]romotion departments [*including the ten individuals identified*] focus primarily on promotion releases by their artist on terrestrial radio.” Levin Decl. ¶ 3; see also First Robinson Decl. ¶ 9; Swidler Decl. ¶ 3;
- 2) “As a general matter, the promotion departments [*including the ten individuals identified*] do not focus on promotional activities on statutorily licensed webcasting services. . . . [T]he label generally does so through its marketing or sales departments.” Levin Decl. ¶¶ 3-4; see also First Robinson Decl. ¶¶ 9-10; Swidler Decl. ¶¶ 3-4;
- 3) “[I]n the ordinary course of their work, the labels’ promotion, marketing and sales departments [*including the ten individuals identified*] do not create ‘studies, analyses,

⁸ Such an undertaking would “be incredibly burdensome” because “almost everything these employees do ‘relates’ in some sense to the possibility that terrestrial radio plays could positively affect record sales” and as a result “it would be very difficult, if not impossible” to reasonably limit the scope of this search. Levin Decl. ¶ 7; First Robinson Decl. ¶ 13; Swidler Decl. ¶ 7.

surveys, presentations, or memoranda' regarding the promotional or substitutional effects that statutorily licensed webcasting services have on other sources of record company revenue." Levin Decl. ¶ 4; *see also* First Robinson Decl. ¶ 10; Swidler Decl. ¶ 4;

- 4) Nor do promotion departments, *including the ten individuals identified*, "in the ordinary course of their work, conduct studies or analyses regarding the promotional or substitutional effect of internet simulcasts." Walker Decl. ¶ 12; *see also* Second Robinson Decl. ¶ 11.
- 5) "To the extent that [the recorded music companies] engage[] at all in creating 'studies, analyses, surveys, presentations, or memoranda' regarding the promotional or substitutional effects that webcasting services operating pursuant to the statutory license have on other sources of record company revenue . . . such documents would be created at the [] corporate level." First Robinson Decl. ¶ 11; *see also* Levin Decl. ¶ 5; Swidler Decl. ¶ 5. To the extent such studies and analyses of simulcasting services as such are done, they would be included in these documents at the corporate level. Walker Decl. ¶ 12; *see also* Second Robinson Decl. ¶ 11.

As a result, to the extent NAB seeks documents related to the promotional or substitutional effect of webcasting (or simulcasting)—the only set of documents reasonably related to the issues involved in these proceedings—they exist at the corporate level and have been produced.

To the extent NAB seeks "all documents" that relate to "promotional effects" of webcasting (including simulcasting) *and terrestrial radio*, as explained in SoundExchange's Opposition to iHeart's Motion, this set of documents would encompass nearly every document related to promotion in the possession of these ten individuals. Because terrestrial radio is not an issue (let alone a central issue) in these proceedings, the substantial burden involved in collecting numerous documents covering several years greatly outweighs the likely benefit to the Judges' determination. The burden would be particularly undue as related to the four individuals from Warner—Mike Easterlin, Andrea Ganis, Peter Gray, and Julie Greenwald. Warner's witness did not testify regarding promotion to terrestrial radio. As a result, they should not be forced to search for documents related to other recorded music companies' witnesses' testimony.

The likely benefits of discovery regarding terrestrial radio promotion are further outweighed because the NAB's members (from whom it can seek documents) *already have* documents relating to terrestrial radio promotion.⁹ NAB's witness, John Dimick, Senior Vice President of Programming & Operations at Lincoln Financial Media Company, testifies at length regarding the promotional efforts that were targeted at him personally and the emails he received from individuals working in promotion departments. Written Direct Testimony of John Dimick at 17-21. If NAB wants to use these documents as evidence to prove an irrelevant point regarding promotion directed at terrestrial radio—it is free to do so.

III. CONCLUSION

SoundExchange respectfully requests that the Judges deny NAB's Motion.

⁹ It is worth noting that NAB has taken the position in discovery that it does not have "possession, custody, or control" of the documents of its witnesses' companies and without basis contends that it is somehow in a different position than SoundExchange. National Association of Broadcasters' Memorandum in Opposition to Motion to Compel (December 8, 2014) at 13 n.8. It is not differently situated and SoundExchange has gone out of its way to collect and produce documents from its witnesses' companies. NAB cannot credibly justify demanding more in discovery from SoundExchange than what it is willing to give. This is especially true here, where evidence of the irrelevant facts NAB apparently seeks to prove are within the possession, custody and control of its own witnesses' companies.

Dated: December 15, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2014, I caused a copy of **SOUNDEXCHANGE'S**
OPPOSITION TO THE NATIONAL ASSOCIATION OF BROADCASTERS' MOTION
TO COMPEL SOUNDEXCHANGE TO PROVIDE DISCOVERY REGARDING THE
RECORD LABELS' PROMOTIONAL ACTIVITIES DIRECTED TO RADIO
BROADCASTERS to be served via electronic mail and first-class, postage prepaid, United
States mail, to the Participants as indicated below:

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